Nos. 14-1468, 14-1470, 14-1507

In the Supreme Court of the United States

DANNY BIRCHFIELD, *Petitioner*,
v.
NORTH DAKOTA, *Respondent*.

WILLIAM ROBERT BERNARD, JR., *Petitioner*,
v.
MINNESOTA, *Respondent*.

STEVE MICHAEL BEYLUND, *Petitioner*,
v.
GRANT LEVI, DIRECTOR, NORTH DAKOTA DEPARTMENT OF TRANSPORTATION,
Respondent.

On Writs of Certiorari to the Supreme Courts of Minnesota and North Dakota

BRIEF OF NEW JERSEY AND SEVENTEEN OTHER STATES AS *AMICI CURIAE* SUPPORTING RESPONDENTS

ROBERT LOUGY
Acting Attorney General of New Jersey
Division of Criminal Justice
Hughes Justice Complex
PO Box 086
Trenton, New Jersey 08625
(609) 292-9086

JENNIFER E. KMIECIAK
Deputy Attorney General
Counsel of Record
kmieciakj@njdcj.org

CLAUDIA JOY DEMITRO
GARIMA JOSHI
IAN C. KENNEDY
LILA B. LEONARD
Deputy Attorneys General

Counsel for *Amici Curiae*
[Additional counsel listed with signature block]

QUESTIONS PRESENTED

1. Whether, in the absence of a warrant, a State may make it a crime for a driver to withdraw his implied consent to take a chemical test to detect the presence of alcohol in the driver's body after the driver has been arrested or otherwise detained on suspicion of impaired driving.

2. Whether consent to submit to a chemical test is valid for Fourth Amendment purposes when the State obtains consent after informing the person that, under its implied-consent law, the withdrawal of consent is a crime.

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STATEMENT OF AMICI INTEREST

The Amici States have a paramount interest in enforcing their impaired-driving laws and effectively prosecuting those who commit the crime of driving while intoxicated. "No one can seriously dispute the magnitude of the drunken driving problem or the States' interest in eradicating it. Media reports of alcohol-related death and mutilation on the Nation's roadways are legion." *Michigan Dep't of State Police v. Sitz*, 496 U.S. 444, 451 (1990). Indeed, intoxicated drivers have been described as "moving time bombs." *State v. Tischio*, 527 A.2d 388, 396 (N.J. 1987).

The questions presented in these consolidated cases concern the constitutionality of implied-consent and test-refusal laws, which are critical to the States' ability to eradicate the frightful "carnage" caused by impaired drivers with "tragic frequency" across the country. *South Dakota v. Neville*, 459 U.S. 553, 558 (1983). This Court has recognized that these laws promote public safety by (1) serving as a deterrent to drunk driving; (2) providing "strong inducement" for suspected drunk drivers to take chemical tests in order to obtain reliable evidence in subsequent criminal proceedings; and (3) promptly removing drunk drivers from our roadways. *See Mackey v. Montrym*, 443 U.S. 1, 18 (1979). Given the importance of implied-consent and test-refusal laws in promoting public safety on our roadways, the Amici States respectfully submit this brief in support of Respondents North Dakota and Minnesota.

SUMMARY OF ARGUMENT

A driver on a public roadway suspected of impaired driving has no constitutional right to refuse to submit to chemical testing to detect alcohol or drugs in the body, and the States can thus lawfully impose punishment for refusal to comply with their implied-consent laws. Implied-consent and test-refusal laws have long existed throughout the country and have withstood various constitutional challenges. *See, e.g.*,

Mackey v. Montrym, 443 U.S. 1 (1979); *South Dakota v. Neville*, 459 U.S. 553 (1983). Petitioners now contend, based on an overly broad reading of this Court's decision in *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), that these laws can no longer co-exist with the Fourth Amendment.

But *McNeely* itself undercuts Petitioners' arguments. *McNeely* considered *only* the narrow question of whether the natural dissipation of alcohol in the bloodstream constitutes a *per se* exigency such that a warrant would never be required for a nonconsensual blood draw in a drunk-driving case. That is a far different question than whether States can condition the privilege of driving on implied consent to chemical testing when a driver is suspected of impaired driving. In fact, a plurality of this Court favorably cited implied-consent laws as a tool the States have to enforce their drunk-driving laws without resorting to nonconsensual blood draws in every case.

Implied-consent laws across the country strike a reasonable balance between the compelling governmental interest in eradicating the scourge of impaired driving and the individual privacy rights of drivers. They do not authorize suspicionless testing of every driver, and the vast majority of States have imposed significant limitations on when a test can be administered despite a suspect's refusal. But for implied-consent laws to be effective at deterring and punishing impaired driving, there must be consequences for a refusal to comply. Nationwide, those consequence range from license suspensions and fines to possible jail time. All of these consequences are eminently reasonable given the public-safety interests at stake.

Certainly, it is not coercive to inform a driver suspected of impaired driving of those lawful consequences. While the choice of whether to submit

to chemical testing or refuse may not be an easy one, this Court has recognized that the criminal process often requires suspects to make difficult choices. Properly and accurately advising a suspect of the applicable law promotes a knowing and voluntary choice.

ARGUMENT

I. States may make it a crime for a driver to withdraw his implied consent to take a chemical test to detect the presence of alcohol in the driver's body after he has been arrested or otherwise detained on suspicion of impaired driving.

A. Petitioners' overly broad reading of *Missouri v. McNeely* is misplaced.

The entire foundation of Petitioners' arguments rests on the erroneous premise that, after *Missouri v. McNeely*, 133 S. Ct. 1552 (2013), the Fourth Amendment no longer allows States to condition driving privileges on implied consent to chemical testing when a driver is suspected of impaired driving. *See, e.g., Birchfield* Pet'r Br. 4 (arguing that the decisions of the North Dakota and Minnesota Supreme Courts rob *McNeely* of "all practical import"). Stated differently, Petitioners are essentially arguing that *McNeely* created a constitutional right to refuse to submit to chemical testing under implied-consent laws and a concomitant right not to be penalized for withdrawing implied consent to such searches. That vastly overreads *McNeely*'s holding and ignores key features of that decision.

In *McNeely*, this Court considered the narrow question "whether the natural metabolization of alcohol in the bloodstream presents a *per se* exigency that justifies an exception to the Fourth Amendment's warrant requirement for nonconsensual blood testing

in all drunk-driving cases." 133 S. Ct. at 1556. In clarifying *Schmerber v. California*, 384 U.S. 757 (1966), the Court held that the natural dissipation of alcohol does not constitute a *per se* exigency. Instead, "exigency in this context must be determined case by case based on the totality of the circumstances." *Id.* at 1556, 1559-63.

The fact-specific question whether sufficient exigency exists in a particular case to justify a nonconsensual blood draw without a warrant is far different from the question whether States can reasonably condition the privilege of driving on implied consent to chemical testing when a driver is suspected of impaired driving. Implied-consent and test-refusal laws have long existed throughout the country, and this Court has previously rejected constitutional challenges to them.

For example, in *Mackey v. Montrym*, 443 U.S. 1 (1979), this Court upheld a state statute providing for the suspension of a driver's license without a pre-suspension hearing upon an impaired-driving suspect's refusal to take a breath test. The Court held that the compelling governmental interest in highway safety justified a summary license suspension pending the outcome of a prompt post-suspension hearing. *Id.* at 19. Likewise, in *South Dakota v. Neville*, 459 U.S. 553 (1983), the Court upheld a state statute allowing evidence of an impaired-driving suspect's refusal to take a blood-alcohol test to be admitted at a later trial for driving-while-impaired.

Nowhere in *McNeely* did this Court suggest that it was overruling *Mackey* and *Neville* and invalidating implied-consent and test-refusal laws under the Fourth Amendment. To the contrary, a plurality of the Court specifically pointed to the existence of implied-consent laws as a reason why its holding does not "undermine the governmental interest in preventing and prosecuting drunk-driving offenses." 133 S. Ct. at

1566. The plurality explained that "States have a broad range of legal tools to enforce their drunk-driving laws and to secure BAC evidence without undertaking warrantless nonconsensual blood draws." *Id.* As its first example, the plurality noted that "all 50 States have adopted implied consent laws that require motorists, as a condition of operating a motor vehicle within the State, to consent to BAC testing. Such laws impose significant consequences when a motorist withdraws consent; typically the motorist's driver's license is immediately suspended or revoked[.]" *Id.* (internal citations omitted). In other words, the plurality in *McNeely* recognized the distinction between implied-consent laws and the question of whether there is sufficient exigency in a particular case to compel a warrantless sample from an impaired-driving suspect. A driver who withdraws his implied consent may be charged with refusal; whether the officer can actually compel the driver to provide the sample is a completely separate question.

To be sure, the plurality opinion in *McNeely* did not expressly address implied-consent laws that impose criminal sanctions "when a motorist withdraws consent." But neither did it express any disapproval of such laws. What counts is what that opinion makes clear, which is support for imposing significant sanctions on drivers who withdraw their implied consent to be searched upon suspicion of drunk driving. As discussed in §I(B), *infra*, traditional Fourth Amendment balancing supports that conclusion, even when the sanction is criminal penalties.

In many cases, *McNeely* also does not control for another important reason. The Petitioner in *Bernard* is challenging his conviction for refusal to take a *breath* test. But *McNeely* considered only whether the natural dissipation of alcohol constituted a *per se* exigency in the context of *blood* testing. 133 S. Ct. at 1556. This Court did not have reason to rule on, and

the parties had no reason to address, whether and when warrantless breath tests are permissible. That is a critical consideration to the States because breath tests are uniformly included in implied-consent laws across the country. *See* Appendix, *infra*.[1]

This Court has already recognized the minimally intrusive nature of breath testing. "Unlike blood tests, breath tests do not require piercing the skin and may be conducted safely outside a hospital environment and with a minimum of inconvenience or embarrassment. Further, breath tests reveal the level of alcohol in the . . . bloodstream and nothing more." *See Skinner v. Ry. Labor. Execs.' Ass'n*, 489 U.S. 602, 625 (1989). On this basis alone, *McNeely* is readily distinguishable.

B. Implied-consent and test-refusal laws strike a reasonable balance between the States' compelling interest in eradicating the scourge of impaired driving and the individual privacy rights of drivers.

Petitioners wrongly suggest that implied-consent and test-refusal laws are *per se* unconstitutional because they condition a government privilege (driving) on the implied consent to chemical testing if a driver is suspected of impaired driving. But this Court has never adopted such a *per se* rule in the context of constitutional challenges to search conditions of government privileges. Instead, the Court has balanced the legitimate governmental interests against the intrusion on individuals' privacy. Thus, in *Skinner*, the Court upheld federal regulations that conditioned certain railroad workers' employment on their taking blood and urine tests because the government's compelling interests in safety on the

[1] The Appendix to this Brief includes a nationwide survey of implied-consent and test-refusal laws.

railways outweighed individual privacy concerns of employees. 489 U.S. at 618-33.

In other contexts, the Court has also balanced government interests and individual expectations of privacy to determine whether a warrantless search is reasonable under the Fourth Amendment. *See, e.g.*, *Maryland v. King*, 133 S. Ct. 1958, 1977-79 (2013) (applying balancing test and upholding state statute providing for DNA cheek swabs of suspects arrested for serious offenses); *Samson v. California*, 547 U.S. 843, 848-57 (2006) (applying balancing test and upholding state statute allowing for warrantless searches of parolees). Applied here, that analysis confirms that implied-consent and test-refusal laws are reasonable under the Fourth Amendment because the compelling governmental interests they serve outweigh the individual privacy rights of drivers suspected of impaired driving.

1. The government interest is immense.

The States unquestionably have a compelling interest in combating alcohol-impaired and drug-impaired driving. As recognized in *McNeely*, implied-consent laws are used nationwide as part of that effort, both to deter impaired driving and to punish the offenders. 133 S. Ct. at 1566. The statistics on impaired driving are nothing short of staggering. In 2014 alone, 9,967 people were killed in alcohol-impaired-driving crashes, an average of 1 alcohol-impaired-driving fatality every 53 minutes.[2] These fatalities accounted for 31 percent of all motor-vehicle fatalities that year.[3]

Significantly, these statistics do not even include drunk-driving crashes that caused physical

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[2] Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts, Alcohol-Impaired Driving* (2014), http://www-nrd.nhtsa.dot.gov/Pubs/812231.pdf.

[3] *Id.*

injury but not death. Nor do these statistics capture injuries or fatalities caused by a *drug*-impaired driver. In 2013-2014, the National Highway Traffic Safety Administration (NHTSA) conducted the most recent National Roadside Survey of Alcohol and Drug Use by Drivers.[4] In its findings, the NHTSA reported an increase in the number of drivers using marijuana or other illegal drugs from its 2007 study.[5] Nearly one in four drivers tested positive for at least one drug that could impair safe driving.[6]

2. Implied-consent laws directly and effectively serve that governmental interest.

Given this compelling governmental interest, it is reasonable for the States to condition driving privileges on the driver's implied consent to chemical testing. This is particularly so because the implied-consent laws are not arbitrary but require suspicion of impaired driving before a test becomes mandatory. In addition, the vast majority of States place significant restrictions on actually administering a chemical test despite a suspect's refusal. Implied-consent laws thus strike a reasonable balance between the governmental interest in eradicating impaired driving and the individual privacy rights of drivers.

Indeed, in the context of drunk driving, this Court has already recognized that implied-consent and test-refusal laws promote public safety on our nation's

[4] Nat'l Highway Traffic Safety Admin., *Traffic Safety Facts, Results of the 2013-2014 National Roadside Survey of Alcohol and Drug Use by Drivers* (February 2015), http://www.nhtsa.gov/staticfiles/nti/pdf/812118-Roadside_Survey_2014.pdf; Nat'l Highway Traffic Safety Admin., *Press Release: NHTSA Releases Two New Studies on Impaired Driving on U.S. Roads* (February 26, 2015), http://www.nhtsa.gov/About+NHTSA/Press+Releases/2015/nhtsa-releases-2-impaired-driving-studies-02-2015.

[5] *Id.*

[6] *Id.*

roadways by (1) serving as a deterrent to drunk driving; (2) providing "strong inducement" for suspected drunk drivers to take chemical tests in order to obtain reliable evidence in subsequent criminal proceedings; and (3) promptly removing drunk drivers from our roadways. *Mackey*, 443 U.S. at 18.

These findings are equally applicable to the growing problem of *drug*-impaired driving, which presents unique challenges distinct from drunk driving. Although breath testing has been recognized as less invasive, it will not reveal the presence of drugs in the body. *See Skinner*, 489 U.S. at 625 (recognizing that a breath test only reveals "the level of alcohol in the bloodstream and nothing more"). A person may be arrested for impaired driving, and a breath test will not reveal the presence of any alcohol. The next reasonable step is for law enforcement to request samples of blood or urine for chemical testing to detect the presence of drugs.[7] Indeed, the vast majority of States have adopted implied-consent laws that cover not only breath, but also blood and urine. *See* Appendix, *infra*. Limiting implied-consent laws to *only* breath testing would unduly hamper States in their ability to combat the growing problem of drug-impaired driving.

3. The intrusion on privacy is minimal.

Conditioning drivers' use of a state's roads on their consent to a chemical test upon detention on suspicion of drunk driving is a relatively small intrusion on drivers' privacy interests. That is so for multiple reasons.

As an initial matter, driving itself is "regulated pervasively." *King*, 133 S. Ct. at 1978 (citing *Skinner*, 489 U.S. at 627). A person cannot legally drive

[7] Multiple States also include saliva or "other bodily substances" in their implied-consent statutes. *See* Appendix, *infra*.

without first obtaining a driver's license. Vehicles must be registered and inspected periodically. When a police officer signals a motor vehicle to stop, the driver must pull over. And during a motor-vehicle stop, the driver must produce certain credentials, including a driver's license, registration, and proof of insurance. All of these regulations, coupled with the statutory notice that implied-consent laws themselves provide to drivers, amount to a reduced expectation of privacy for drivers traveling on public roadways. *See California v. Carney*, 471 U.S. 386,392 (1985); *see also Williams v. State*, 167 So. 3d 483, 493-94 (Fla. Dist. Ct. App. 2015) (considering decreased privacy in motor vehicles in determining reasonableness of breath-alcohol test).

Second, as the Appendix, *infra*, shows, the states' implied-consent laws are triggered only when "a driver is arrested or otherwise detained on suspicion of a drunk-driving offense." *McNeely*, 133 S. Ct. at 1566. On this basis alone, Petitioners' reliance on *Camara v. Mun. Court of San Francisco*, 387 U.S. 523 (1967), is misplaced.

In *Camara*, a property owner refused to allow a warrantless inspection of his premises under a city ordinance providing that employees, "upon presentation of proper credentials, have the right to enter, at reasonable times, any building, structure, or premises in the City, to perform any duty imposed upon them by the Municipal Code." *Id.* at 525-27. The property owner was then criminally charged for that refusal. *Id.* at 527. This Court held that the property owner "had a constitutional right to insist that the inspectors obtain a warrant to search and . . . may not constitutionally be convicted for refusing to consent to the inspection." *Id.* at 540.

Unlike the law at issue in *Camara*, implied-consent laws do not authorize suspicionless chemical testing of any driver. Instead, as noted, they are

limited to cases where a driver is arrested or otherwise detained on suspicion of impaired driving. This significant limitation on an officer's authority to seek such testing "represents a necessary accommodation between the individual's right to liberty and the State's duty to control crime." *Gerstein v. Pugh*, 420 U.S. 103, 112 (1975). Here, of course, the States' interest goes well beyond merely controlling crime but extends to preventing carnage on our roadways. This limitation thus protects drivers who comply with the law by enabling them to resort to the courts for an appropriate remedy if the police did not have the requisite grounds under the implied-consent law for requesting the sample from the driver in the first instance. But when the police have complied with the implied-consent law, suppression should never be a remedy.

A driver's expectation of privacy is even further reduced when — as is the case in *Birchfield* and *Bernard* — he or she is *arrested* on suspicion of impaired driving. An arrest is "inevitably accompanied by future interference with the individual's freedom of movement," *Terry v. Ohio*, 392 U.S. 1, 26 (1968); and arrestees are subject to searches incident to arrest, *see United States v. Robinson*, 414 U.S. 218, 235 (1973), and "routine administrative booking procedure[s]" that include "a station-house search of the arrestee's person and possessions," *Illinois v. Lafayette*, 462 U.S. 640, 643, 645 (1983), and photographing and fingerprinting. *See King*, 133 S. Ct. at 1976; *see also id.* at 1977-79 (upholding state statute providing for DNA cheek swabs of suspects arrested for serious offenses).

The vast majority of States also place significant restrictions on when law enforcement may obtain a chemical sample despite a suspect's refusal. Testing over a suspect's objection is often limited to cases involving an accident resulting in serious bodily injury or death, or where law enforcement obtains a search

warrant or other court order. *See McNeely*, 133 S. Ct. at 1566-67; *see also* Appendix, *infra*. Absent those circumstances, no search even occurs. Indeed, in both *Birchfield* and *Bernard*, no test was given after the refusal.[8] That approach serves the public interest by reducing confrontations between citizens and law enforcement. At the same time, the implied-consent advisory lets the driver know the consequences of withdrawing his or her implied consent.

4. The sanctions States impose for withdrawing implied consent—including criminal penalties—are reasonable and proportionate.

For implied-consent laws to be effective at deterring and punishing impaired driving, a refusal to comply must carry consequences. At a minimum, it is reasonable for States to impose a license suspension when an impaired-driving suspect refuses to comply with the implied-consent law; indeed, the vast majority of States do so. *See* Appendix, *infra*.

After all, "[t]o have used the roads, only thereafter to refuse to consent to chemical testing, is to abuse the driving privilege, and justifies a suspension of those privileges." *People v. Harris*, 170 Cal. Rptr. 3d 729, 735 (2014). And given the inherent dangers of impaired driving to everyone else on the roadways, "[t]he public also has a right to expect the bargain to be honored. . . . [A] person who has shown a disinclination to abide by the agreement is not a fit candidate for continued, immediate, limitless use of the highways." *Id. Accord Neville*, 459 U.S. at 560 (recognizing that suspending a driver's license for refusal to take a blood-alcohol test is "unquestionably legitimate" assuming appropriate procedural protections).

[8] In *Birchfield*, the Petitioner took a preliminary breath test which suggested that he was intoxicated, but he refused to take a blood test. *See Birchfield* Pet'r Br. 4.

It is also reasonable for States to criminalize test refusal as a separate offense, which multiple States, including North Dakota and Minnesota, have chosen to do. *See* Appendix, *infra*. In a 2008 report to Congress, the NHTSA recommended that States should have strong laws and penalties for test refusal in order to increase testing rates for impaired-driving suspects and drivers involved in fatal crashes.[9] Specifically, the National Highway Traffic Safety Administration (NHTSA) recommended that "States should review their laws and practices to ensure that refusal to take a BAC test is a criminal offense and that the penalties are greater than those for conviction on an impaired driving offense."[10]

The NHTSA report expressed concern that license suspension alone, as a consequence of test refusal, may be insufficient to deter and punish impaired driving. As the report notes, "[t]here is suspicion that many DWI offenders refuse to take the BAC test in order to avoid or reduce the chance of facing criminal sanctions upon conviction for DWI; instead they may hope to receive a minor administrative license suspension for their criminal and dangerous behavior, rather than sanctions appropriate with a DWI conviction."[11] It is thus reasonable for a State to impose the same sanctions for test refusal as those that apply to a DWI conviction itself to both deter and punish impaired driving.

* * * *

All told, it is eminently reasonable for the States to condition the privilege of driving on the driver's implied consent to chemical testing when a driver is

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[9] Nat'l Highway Traffic Safety Admin., *Refusal of Intoxication Testing: A Report to Congress* (2008), http://www.nhtsa.gov/DOT/NHTSA/Traffic%20Injury%20Control/Articles/Associated%20Files/811098.pdf.

[10] *Id.* at 20.

[11] *Id.* at 18.

arrested or otherwise detained for impaired driving. In the vast majority of States, drivers can revoke that implied consent (absent a court order or an accident involving death or serious bodily injury) and no test will be given. *See McNeely*, 133 S. Ct. at 1566-67; *see also* Appendix, *infra*. But to deter and punish drunk driving, the States have reasonably chosen to impose penalties, ranging from license suspensions and fines to criminal penalties, including possible jail time, for test refusal. *Id.* In short, implied-consent and test-refusal laws strike a reasonable balance between the governmental interest in promoting public safety on our roadways and the individual privacy rights of drivers.

II. A driver's decision to consent to a chemical test is not coerced by the penalties attached to a refusal.

Accurately informing a driver of the penalties for refusal ensures that the driver makes an informed choice about whether to consent to the testing or refuse the testing. It does not, as the Petitioner in *Beylund* contends, render the driver's decision to consent to testing *per se* involuntary. Such a *per se* rule "has no more place in Fourth Amendment law than the *per se* exigency rejected by the majority in *McNeely*." *People v. Harris*, 184 Cal. Rptr. 3d 198, 211 (Cal. Ct. App. 2015).

Indeed, this Court has already recognized that "the choice to submit or refuse to take a blood-alcohol test will not be an easy or pleasant one for a suspect to make. But the criminal process often requires suspects and defendants to make difficult choices." *Neville*, 459 U.S. at 564. In *Neville*, this Court held that "a refusal to take a blood-alcohol test, after a police officer has lawfully requested it, is not an act coerced by the officer, and thus is not protected by the privilege against self-incrimination." *Id.*

The same reasoning applies to a driver's decision to submit to a chemical test rather than face penalties for a refusal. "[A]dvising a defendant of the lawful consequences that may flow from his or her decision to engage in a certain behavior ensures that [the] defendant makes an informed choice whether to engage in that behavior or not." *State v. Moore*, 318 P.3d 1133, 1138 (Or. 2013). *Accord Harris*, 184 Cal.Rptr.3d at 211-13 (applying *Neville* and holding that choice between submitting to chemical test or facing consequences for refusal under implied-consent law "does not in itself render the motorist's submission to be coerced or otherwise invalid" under Fourth Amendment).

In arguing otherwise, Beylund's reliance on *Bumper v. North Carolina*, 391 U.S. 543, 546-50 (1986), is misplaced. In *Bumper*, this Court found a homeowner's consent to search invalid when the homeowner acquiesced to the police entry after she was informed that police had a search warrant for her home. This Court held that "[w]hen a law enforcement officer claims authority to search a home under a warrant, he announces in effect *that the occupant has no right to resist the search*." *Id.* at 550 (emphasis added). Unlike *Bumper*, in the vast majority of States, impaired-driving suspects are given a choice whether to submit to the law or refuse a chemical test and suffer the legal consequences. The driver's choice is honored absent a court order or an accident involving death or serious bodily injury. *See State v. Brooks*, 838 N.W.2d 563 (Minn. 2013) (rejecting defendant's argument that his consent to chemical testing of his blood and urine was involuntary because, unlike *Bumper*, the Minnesota implied-consent law gives drivers a statutory right to refuse a chemical test); *see also* Appendix, *infra*.

In other words, it is actually to a driver's benefit to be fully informed of the applicable law before making the decision whether to consent to or refuse a

chemical test. After all, it can hardly be considered coercive to accurately advise an impaired-driving suspect of the governing law, which he or she is already presumed to be on notice of. *See Elonis v. United States*, 135 S. Ct. 2001, 2009 (2015) (recognizing "the familiar maxim [that] ignorance of the law is no excuse" for engaging in criminal behavior). In fact, some States actually require such an advisement. *See, e.g.*, *State v. O'Driscoll*, 73 A.3d 496 (N.J. 2013) (requiring State to prove as element of refusal conviction that defendant was informed of consequences of refusal). *Cf. Brewer v. Motor Vehicle Div.*, 720 P.2d 564, 569-70 (Colo. 1986) (holding that there is "no constitutional or statutory requirement" that an impaired-driving suspect be advised of legal consequences of refusal). When a police officer accurately advises an impaired-driving suspect about the governing implied-consent law, that is not coercive but in fact promotes a knowing and voluntary choice.

* * * *

In sum, a driver on a public roadway suspected of impaired driving has no constitutional right to refuse to submit to chemical testing to detect alcohol or drugs in the body, and the States can thus lawfully impose punishment for refusal to comply with their implied-consent laws. Certainly, informing a driver suspected of impaired-driving of those lawful consequences is not coercive but in fact promotes a knowing and voluntary choice.

CONCLUSION

For the foregoing reasons, the judgments of the North Dakota Supreme Court and the Minnesota Supreme Court should be affirmed.

Respectfully submitted,

ROBERT LOUGY
Acting Attorney General of New Jersey

JENNIFER E. KMIECIAK
Deputy Attorney General
Counsel of Record
kmieciakj@njdcj.org

CLAUDIA JOY DEMITRO
GARIMA JOSHI
IAN C. KENNEDY
LILA B. LEONARD
Deputy Attorneys General

New Jersey Division of Criminal Justice
Appellate Bureau

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ADDITIONAL COUNSEL

Luther Strange
Attorney General
State of Alabama

Craig W. Richards
Attorney General
State of Alaska

Leslie Rutledge
Attorney General
State of Arkansas

Cynthia H. Coffman
Attorney General
State of Colorado

Douglas S. Chin
Attorney General
State of Hawaii

Derek Schmidt
Attorney General
State of Kansas

Jeff Landry
Attorney General
State of Louisiana

Timothy C. Fox
Attorney General
State of Montana

Hector Baldares
Attorney General
State of New Mexico

Bruce R. Beemer
First Deputy Attorney General
Commonwealth of Pennsylvania

Peter F. Kilmartin
Attorney General
State of Rhode Island

Alan Wilson
Attorney General
State of South Carolina

Marty J. Jackley
Attorney General
State of South Dakota

Ken Paxton
Attorney General
State of Texas

Sean D. Reyes
Attorney General
State of Utah

William H. Sorrell
Attorney General
State of Vermont

Brad D. Schimel
Attorney General
State of Wisconsin

APPENDIX

Nationwide Survey of Implied Consent and Refusal Laws

	Statutes	**Sample(s) Authorized**	**Test Given If Refusal?**	**Lic. Susp./ Fines**	**Jail Time**
AL	Ala. Code § 32-5-192; -200	Blood, breath, or urine	Death or serious physical injury (SPI) + court order (blood)	**1st:** 90 days **2nd+**: 1 yr (if w/in 5 yrs) If death or SPI: 2 yrs	N/A
AK	Alaska Stat. § 28.15.181; .35.031; .032;.035	Breath; blood and urine in death or serious physical injury (SPI)	Only if death or SPI	**1st**: 90 days, $1,500 min **2nd**: 1 yr, $3,000 min **3rd**: 3 yrs, $4,000 min **4th**: 5 yrs min, $4,000 - $7,000	**1st**: 72 hrs min **2nd**: 20 days min **3rd+**: 60-360 days

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
AZ	Ariz. Rev. Stat. Ann. § 28-1321	Blood, breath, urine or other bodily substance	Only with search warrant or if sample is taken "for any reason," must be provided to law enforcement	**1st**: 12 mos; **2nd+**: 2 yrs if prior w/in 84 mos	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
AR	Ark. Code Ann. § 5-65-202; -205; -208	Blood, breath, saliva or urine	Only if DWI + death	**1st**: 180 days; **2nd**: 2 yrs if w/in 5 yrs of 1st offense; **3rd**: 3 yrs if w/in 5 yrs of 1st offense **4th**: Life if w/in 5 yrs of 1st offense	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
CA	Cal Veh. Code § 13353; 14905; 23612	Blood or breath (person chooses); urine if blood test unavailable	Only if DWI + circumstances require prompt testing (case law)	**1st**: 1 yr **2nd**: 2 yrs if w/in 10 yrs of 1st offense **3rd**: 3 yrs if w/in 10 yrs of 1st offense Fine: $125	If convicted of DWI
CO	Colo. Rev. Stat. § 42-2-126; -4-1301.1	Breath or blood for alcohol (person can choose); blood, saliva, and urine for drug content	Only if DWI + enumerated offense	**1st**: 1 yr **2nd**: 2 yrs **3rd**: 3 yrs	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
CT	Conn. Gen. Stat. § 14-227b; -227c	Blood, breath, or urine; blood or breath if death or serious physical injury (SPI)	Only if DWI + death or SPI	45 day susp. plus interlock device for 1 to 3 yrs	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
DE	Del. Code Ann. tit. 21 § 2740; 2742	Blood, breath, and/or urine	No	**1st**: 1 yr **2nd**: 18 mos if prior refusal w/in 5 yrs **3rd +**: 24 mos if 2 prior refusals w/in 5 yrs (Different penalties for under age 21)	N/A
DC	D.C. Code Ann. § 50-1904.02; .05	Blood, breath, or urine (officer chooses)	Only if DWI + death (may employ whatever means are reasonable)	12 mos	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
FL	Fla. Stat. Ann. § 316.1932; .1933; .1939	Including, but not limited to, breath for alcohol content, blood for death or serious bodily injury (SBI); urine for drug content	Only if DWI + death or SBI (may use reasonable force if necessary)	**1st**: 1 yr **2nd+**: 18 mos Fine: $1,000 max	**2nd+**: up to 1 yr

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
GA	Ga. Code Ann § 40-5-55; -67.1; -67.2	Blood, breath, urine, or other bodily substances	Does not preclude search warrant	**1st**: 1 yr **2nd**: 3 yrs **3rd+**: 5 yrs	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
HI	Haw. Rev. Stat. § 291E-11, -15, -21, -68 *Note*: Consent after informed of criminal refusal consequences not voluntary under Hawaii Constitution. *State v. Won*, 361 P.3d 1195 (Haw. 2015).	Breath, blood, or urine	Only if collision results in injury or death	Fine: $1,000 max Admin Rev: **1st**: 2 yrs **2nd**: 3 yrs **3rd**: 4 yrs **4th**: 10 yrs (Ch. 291E, Part III; § 291E-41) (Under 21: **1st**: 1 yr **2nd+**: 2-5 yrs No fine (§ 291E-65))	30 days max (Under age 21: none)

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
ID	Idaho Code § 18-8002	Breath, blood, or urine	Only if aggravated driving or death	1st: 1 yr 2nd+: 2 yrs Fine: $250	N/A
IL	625 Ill. Comp. Stat. 5/6-208.1; 5/11-501.1; -501.6; -501.8	Breath, blood, or urine	No statutory right to refuse, but officer cannot use physical force (case law)	**1st**: 1 yr **2nd+**: 3 yrs	N/A
IN	Ind. Code § 9-30-6-1; -6-6(h); -7-3; -7-5	Breath, blood, or urine	Reasonable force authorized	**1st**: 1 yr **2nd+**: 2 yrs	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
IA	Iowa Code Ann. § 321J.6	Breath, blood, or urine	Warrant + death or likely death; warrantless with exigency; driver can refuse blood test if they submit to officer's 2nd choice	**1st**: 1 yr **2nd+**: 2 yrs Provisions for ignition interlock for temporary restricted license	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
KS	Kans. Stat. Ann. § 8-1001(a); -1025 (refusal statute invalidated in *State v. Ryce*, No. 111,698, 2016 Kan. LEXIS 107 (Kan. February 26, 2016)	Breath, blood, or urine	Case law pending	1 yr lic. susp.; If prior DUI/ refusal (criminal): **1st**: $1,250-$1,750 **2nd**: $1,750-$2,500 **3rd+**: $2,500	If prior DUI/refusal **1st:** 90 days-1 yr (min 5 days, work release after 48 hrs) **2nd & 3rd:** min 90 days (work release after 48 hrs (2nd), 72 hrs (3rd)) Struck down in *Ryce* under 4th Amend.

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
KY	Ky. Rev. Stat. Ann. § 189A.070; .103; .105	Breath, blood, or urine	Only if search warrant or court order + death or physical injury	**1st**: 30-120 days **2nd**: 12-18 mos **3rd+**: 24-36 mos	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
LA	La. Rev. Stat. Ann. § 14:98.7; 32:661; :666; :667	Breath, blood, or urine	Only if DWI + injury or death, or two prior refusals	1 yr, no eligibility for hardship license if death or serious bodily injury **1st**: 1 yr **2nd**: 2 yrs if prior refusal w/in 10 yrs Fine: $300 to $1,000	10 days-6 mos

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
ME	Me. Rev. Stat. Ann. tit. 29-A, § 2521; 2522	Breath, blood, or urine	Only if DWI + death or life threatening injury	**1st**: 275 days; 1 yr if injury or death **2nd**: 18 mos **3rd**: 4 yrs **4th+**: 6 yrs	N/A
MD	Md. Code Transp.§ 16-205.1; 205.2	Breath (or blood if statutory conditions require) for alcohol; blood for drug content	Only if DWI + death or life threatening injury	**1st**: 120 days **2nd+**: 1 yr	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
MA	Mass. Gen. Law ch. 90, § 24 (1) (f)(1)	Breath or blood	No	**1st**: 180 days **2nd**: 3 yrs **3rd**: 5 yrs **4th+**: Life	N/A
MI	Mich. Comp. Laws § 257.625a(6); .625d, .625f	Blood, breath, or urine (preliminary breath test)	Only with a court order	**1st**: 1 yr **2nd+**: 2 yrs	N/A
MN	Minn. Stat. § 169A.03; .20; .24; .26; .275-.76; .51-.53	Blood, breath, or urine	Only if DWI + vehicular homicide or injury	**1st**: 1 yr min, $3,000 max **2nd**: 2 year min, $3,000 max **3rd+**: 3 year min, $3,000-$14,000	**1st, 2nd, and 3rd**: 1 yr max **4th**: 7 yrs max

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
MS	Miss. Code § 63-11-5; -8; -21; -23; -30(4)	Breath for alcohol; blood, breathe, or urine for other substances	Only if warrant or exigency (case law)	For breath refusal: 90 days (no prior DWI); 1 yr (prior DWI); provisions for restricted lic. w/ ignition interlock	N/A
MO	Mo. Ann. Stat. § 577.020; .041	Blood, breath, urine, or saliva	Unsettled (prior version of statute provided that no test shall be given upon refusal, but that phrase was deleted from the statute)	1 yr	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
MT	Mont. Code Ann. § 61-8-402; -409; 402(6)(a)	Blood or breath (prelim. breath test)	Blood, only if probable cause + search warrant + person has prior refusal or has certain DWI charges or convictions	**1st**: 6 mos **2nd+**: 1 yr Fine: $300	N/A
NE	Neb. Rev. Stat.§ 28-105; -106; § 60-498.01(2); -498.02; -6,197; 6,197.02; -197.04	Blood, breath, or urine (prelim. breath test)	No	**1st:** 1 yr admin and 6 mos criminal, $500 max **2nd:** 18 mos, $500 max **3rd+:** 15 yrs, $1,000-$10,00	**1st:** 60 days max **2nd:** 6 mos max **3rd:** 1 yr max **4th**: 3 yrs max

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
NV	Nev. Rev. Stat. Ann. § 484C.150; .160; .210(1)	Blood, breath, or urine (preliminary breath test)	Only if warrant or court order (case law)	**1st**: 1 yr **2nd+**: 3 yrs	N/A
NH	N.H. Rev. Stat. 265-A:4; -A:14; -A:15, -A:16	Blood, breathe, or urine (preliminary breath test)	Only if DWI + death or serious bodily injury	**1st**: 180 days **2nd+**: 2 yrs	N/A
NJ	N.J. Stat. Ann. § 39-50.2; -50.4a	Breath	Only if search warrant or exigency, but no unreasonable force (case law)	**1st**: 7 mos-1 yr, $300-$500 **2nd**: 2 yrs, $500-$1,000 **3rd**: 10 yrs, $1,000	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
NM	N.M. Stat. Ann. § 66-8-107; -111	Breath, blood, or both	Only if search warrant + DWI + death or great bodily injury or felony	**1st**: 6 mos **2nd+**: 1 yr	N/A
NY	N.Y. Veh. & Traf. Law § 1194	Breath, blood, urine, or saliva	Only if court order + DWI + death or serious physical injury	**1st**: 1 yr, $500 **2nd+**: 18 mos, $750	N/A
NC	N.C. Gen. Stat. § 20-4.01; -16.2	Breath, blood, or other bodily fluid or substance	Does not preclude other applicable procedures of law	12 mos	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
ND	N.D. Cent. Code § 39-08-01; -20-01; -20-01.1	Breath, blood, or urine	Only if search warrant or exigency + DWI + death or serious bodily injury	License suspension: 180 days-3 yrs Fines: $500-$2,000 (depending on number of prior refusals)	**1st**: 2 days min if BAC .16+ **2nd** (w/in 7 yrs): 10 days min + sobriety program **3rd** (w/in 7 years): 120 days min **4th+** (w/in 15 yrs): 1 yr + 1 day

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
OH	Ohio Rev. Code Ann. § 4511.191	Whole blood, blood serum or plasma, breath, or urine	Yes: officers may employ whatever reasonable means are necessary	**1st**: 1 yr **2nd**: 2 yrs (if prior refusal w/in 6 yrs) **3rd**: 3 years (if prior refusal w/in 6 years) Fine:$475 to reinstate license	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
OK	47 Okl. St. § 6-205.1; 751; 753;	Blood or breath for alcohol; blood, saliva or urine for other intoxicating substances	Only if DWI + search warrant or death or serious physical injury	**1st**: 180 days **2nd**: 1 yr (if prior refusal w/in 10 yrs) **3rd**: 3 yrs (if prior refusal w/in 10 yrs)	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
OR	Or. Rev. Stat. § 813.095; .100; .130; .131; .420, .430	breath; blood (if the person is receiving medical care after accident); urine if breath test less than 0.08 or accident with injury or property damage	Breath or blood through any lawful means, including, but not limited to, obtaining a search warrant.	**1st**: 1 yr **2nd+**: 3 yrs (if prior refusal, DWI, or diversion program w/in 5 years) Fine: $500-$1,000	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
PA	75 Pa. Cons. Stat. Ann. § 1547	Breath, blood, or urine	No	**1st**: 1 yr **2nd+**: 18 mos	N/A
PR	P.R. Laws Ann., tit. 9, § 5208	Blood, breath, or other bodily fluid	If refusal, person shall be arrested and transferred to medical facility to extract pertinent sample	Penalties not specified	Penalties not specified

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
RI	R.I. Gen. Laws § 31-27-2.1	Breath, blood, and/or urine	Only if search warrant	**1st**: 6 mos-1 yr, $200-$500 **2nd**: 1-2 yrs (if refusal w/in 5 yrs of previous offense) $600-$1,000 **3rd**: 2-5 yrs (if refusal w/in 5 years of previous offense), $800-$1,000	**2nd**: 6 mos max **3rd**: 1 yr max

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
SC	S.C. Code Ann. § 56-5-2946; -2950; -2951	Breath, blood, or urine (breath first if alcohol)	Only if DWI + great bodily injury or death	**1st**: 6 mos **2nd**: 9 mos **3rd**: 12 mos **4th+**: 15 mos	N/A
SD	S.D. Codified Laws § 32-23-1; -10; -11 *Note:* Implied-consent law invalidated in *State v. Fierro*, 853 N.W.2d 235 (S.D. 2014)	Breath, blood, or other bodily substance	Only if search warrant, actual consent, or exigent circumstances	1 yr	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
TN	Tenn. Code Ann. § 55-10-406; -407	"a test or tests for the purpose of determining the alcoholic content of that person's blood, a test or tests for the purpose of determining the drug content of the person's blood, or both tests"	Only if warrant; accident involving injury or death + probable cause (PC) for DWI, vehicular homicide (VH) or aggravated vehicular homicide (AVH); PC for DWI, VH, or AVH + prior conviction for one of these offenses; or PC for DWI, VH, or AVH + passenger under 16	**1st**: 1 yr; 2 yrs if serious bodily injury; 5 yrs if death **2nd+**: 2 yrs; 5 years if death Fine: $1,000 if driving while suspended	if refusal occurs while driving on suspended license: 5 days

	Statutes	Samplè(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
TX	Tex. Transp. Code Ann. § 724.011; .012(b); .013; .035	Breath or blood (officer chooses, but driver can consent to another specimen)	Only if DWI + death/serious bodily/penal Code arrest/on CSL	**1st**: 180 Days **2nd+**: 2 yrs	N/A
UT	Utah Code Ann. § 41-6a-520; -521	Breath, blood, urine, or oral fluids	No	**1st**: 18 mos **2nd+**: 36 mos If previous alcohol-related suspension or prior DUI conviction w/in 10 yrs, 36 mos	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
VT	Vt. Stat. Ann. tit. 23 § 1201(b); 1202; 1205; 1206; 1208; 1210	Breath, blood	Only if DWI + search warrant + accident or death or serious bodily injury (SBI)	**1st:** 6 mos but if prior DWI, then 90 days and $750 max **2nd:** 18 mos and if prior DWI $1,500 max **3rd:** Life and if prior DWI $2,500 max **SBI**: 6 mos, $5,000 max **Death:** 1 yr, $10,000 max	**1st & 2nd:** if prior DWI, 2 yrs max **3rd:** if prior DWI, 5 yrs max **4th+**:if prior DWI, 10 yrs max **SBI or death**: 15 yrs max

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
VA	Va. Code Ann. § 18.2-268.2; -268.3; § 46.2-391.2	Blood, breath	Blood may be required if drugs, high BAC, under 21, or Suspended License	**1st:** 1 yr + 7 days **2nd:** 3 yrs + 60 days, fines for Class 2 misd. If prior DWI w/in 10 yrs **3rd**: 3 yrs, fines for Class 1 misd. If 2 prior DWIs w/in 10 yrs	**2nd**: if 1 prior DWI w/in 10 yrs, Class 2 misd. **3rd**: if 2 prior DWIs w/in 10 yrs, Class 1 misd.

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
WA	Wash. Rev. Code Ann. §46.20.308; .3101	Breath	Only if exigent circumstances or warrant (blood)	**1st:** 1 yr **2nd:** 2 years (if prior incident w/in 7 yrs)	If convicted of DWI
WV	W. Va. Code § 17C-5-4	Blood or breath (secondary chemical testing only)	Does not preclude search warrant (case law)	**1st**: 1 yr or 45 days with 1 yr interlock **2nd**: 10 yrs (can be reduced to 5 upon completion of safety program **3rd+**: Life	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
WI	Wis. Stat. Ann. § 343.305	Breath, blood, or urine (officer chooses)	Only if exigent circumstances	**1st**: 1 yr **2nd**: 2 yrs if prior OWI-related convictions, suspensions, or revocations (refusals count as priors) w/in 10 yrs **3rd**: 3 yrs if 2+ prior convictions (described above) in lifetime	N/A

	Statutes	Sample(s) Authorized	Test Given If Refusal?	Lic. Susp./ Fines	Jail Time
WY	Wyo. Stat. Ann. § 31-6-102	Blood, breath, or urine	Only if DWI + serious bodily injury or death or search warrant	N/A	N/A